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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

TIMOTHY McLAUGHLIN,

Appellant,

v.

CITY OF LOS ANGELES et al.,

Respondents.

B217198

(Los Angeles County Super. Ct.
No. BS114748)

APPEAL from a judgment of the Superior Court of Los Angeles County.
James Chalfant, Judge. Affirmed.

Stone Busailah, Michael B. Stone, and Marc J. Berger for Appellant.

Carmen Trutanich, City Attorney, and Claudia McGee Henry, Senior Assistant
City Attorney for Respondents.

INTRODUCTION

Timothy McLaughlin, an officer with the City of Los Angeles Police Department (LAPD), was disciplined by a Board of Rights for use of deficient tactics and unauthorized use of force while attempting to arrest a resisting suspect. He was suspended for four days without pay.

McLaughlin challenged the decision by filing a petition for writ of mandate in the trial court. He conceded his guilt on the charge of using deficient tactics, but argued the unauthorized use of force allegation was not supported by the evidence. The trial court disagreed and denied the petition. McLaughlin appeals, again contending there is no evidence to support the judgment. Because substantial evidence supports the trial court's ruling, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Use of Force Incident*

On the evening of February 17, 2005, McLaughlin and Officer Aquiles Morales were in their police cruiser in Los Angeles when they were flagged down by three black males. They said, "Follow that Lexus. He has a gun." According to McLaughlin, he also heard them say the word "robbery."

The officers pursued the Lexus. When the driver, Joel Wilbarn, looked back and saw he was being pursued by police, he accelerated to about 90 miles per hour on a residential street and ignored a stop sign. Wilbarn lost control, collided with some parked cars and a utility pole, and flipped his car upside down. He then crawled out of the Lexus and ran away toward nearby houses with his hands in his waistband under his jacket while being hunched over, as if he was concealing something. McLaughlin drew his weapon and repeatedly ordered Wilbarn to get on the ground. Officer Morales also followed while taking cover. Wilbarn continued running, keeping his right hand inside his jacket, in his waistband.

Wilbarn then made a quick turn, placing himself in front of a car. McLaughlin pointed his weapon at Wilbarn with his finger on the trigger. He said, “Get on the ground or I will shoot you mother fucker.” McLaughlin believed Wilbarn was armed. But he did not shoot because he did not see a gun. Instead, when McLaughlin was about three yards away from Wilbarn, he saw an opportunity to pin him on the hood of the car. He did so, using his forearm against Wilbarn’s back and his body weight to hold Wilbarn against the hood. But Wilbarn continued to struggle and appeared to be trying to take something out of his jacket in front of him. Morales, who had arrived to assist McLaughlin said, “he’s got something” or “he’s trying to pull something out.” McLaughlin ordered Wilbarn to “give up [his] hand” so he could handcuff him, but Wilbarn would not comply.

Morales holstered his gun and attempted to control Wilbarn’s right arm. But he was unable to do so and therefore struck Wilbarn in the back with his fist. Another officer arrived – Christopher Merrin – and positioned himself on Wilbarn’s left. He tried to control Wilbarn’s left hand and arm by punching him on the shoulder several times as hard as he could, but it had no effect.

McLaughlin then hit Wilbarn in the back of the head with the butt of his still drawn pistol, saying, “Give up your hands.” McLaughlin again hit Wilbarn in the head with the pistol, wanting to knock him out, because he believed Wilbarn was trying to arm himself. Wilbarn let out a sigh and said, “All right” or, “Okay, okay.” The second blow took the fight out of Wilbarn, who then loosened his arms and was handcuffed.¹

Wilbarn was searched, but did not have a gun. A gun was later found in the area, suggesting Wilbarn had thrown it out of the window of his car before it crashed. Wilbarn was injured by the blows to his head and needed sutures.

¹ Throughout the briefs filed in this court, as well as during oral argument, McLaughlin’s counsel characterized the blows to Wilbarn’s head as “pistol-whipping”.

B. *The Board of Rights Hearing*

After an investigation, a Board of Rights convened to consider charges against McLaughlin for utilizing deficient tactics, use of unauthorized force, and making a discourteous statement.

The Board of Rights considered the testimony of McLaughlin, Morales, Merrin, and five experts, and concluded McLaughlin (1) made tactical errors by, among other things, approaching Wilbarn without cover and then attempting to arrest him while both of his hands were occupied with a weapon and flashlight at the time he made physical contact with Wilbarn; (2) used unauthorized deadly force during the arrest by striking Wilbarn in the head with a gun, even though Wilbarn's actions indicated an intent to flee rather than to attack the officers, no gun had been seen, and the strike was not a last resort action because there were less lethal options available; and (3) used street language in an attempt to control a dynamic situation, which was appropriate given the nature and context of the incident. The Board of Rights specifically concluded that McLaughlin's tactical errors significantly led to limiting his options, which in turn led to the unauthorized use of deadly force.

The Board of Rights recommended that McLaughlin's penalty for deficient tactics and unauthorized use of force be four days suspension without pay. The Chief of Police adopted that punishment.

C. *Trial Court Proceedings*

McLaughlin filed a petition for writ of mandate in the superior court seeking an order compelling the City to set aside the suspension. At trial, McLaughlin conceded his guilt on the charge that he used deficient tactics in attempting to arrest Wilbarn, but argued the charge of unauthorized use of force was not supported by the weight of the evidence.

The trial court affirmed the decision of the Board of Rights. This appeal followed.

DISCUSSION

A. *Standard of Review*

In a mandamus proceeding, a trial court may reverse an agency's administrative decision if it finds there was any prejudicial abuse of discretion. (Code Civ. Proc., § 1094.5, subd. (b).) The court may find such abuse if the agency did not proceed in the manner required by law, its decision was not supported by the findings, or the findings were not supported by the evidence. (*Ibid.*)

The trial court in this case determined that the agency decision affected a fundamental vested right and therefore applied the independent judgment test. Neither party argues the trial court used an incorrect standard of review. The independent judgment test required the trial court to not only examine the administrative record for errors of law, but also exercise its independent judgment upon the evidence in a limited trial de novo. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 143-144 (*Bixby*); see also *Deegan v. City of Mountain View* (1999) 72 Cal.App.4th 37, 45.) The trial court was permitted to draw its own reasonable inferences from the evidence and make its own credibility determinations. (*Morrison v. Housing Authority of the City Los Angeles Bd. of Comrs.* (2003) 107 Cal.App.4th 860, 868.) At the same time, it had to afford a strong presumption of correctness of administrative findings, thereby requiring the challenging party to demonstrate that such findings are contrary to the weight of the evidence. (*Fukuda v. City of Los Angeles* (1999) 20 Cal.4th 805, 817.)

Our task is to review the record and determine whether the trial court's findings (not the administrative agency findings) are supported by substantial evidence. (*Bixby, supra*, 4 Cal.3d at pp. 143, fn. 10.) We resolve all evidentiary conflicts and draw all legitimate and reasonable inferences in favor of the trial court's decision. (*Valiye v. Department of Motor Vehicles* (1999) 74 Cal.App.4th 1026, 1031.)

B. The Trial Court's Ruling Is Supported by Substantial Evidence

The trial court observed that LAPD regulations permit an officer to use deadly force when it reasonably appears necessary to protect himself or others against the immediate threat of death or serious bodily injury or to apprehend a fleeing felon who has committed a violent crime and whose escape presents a substantial risk of death or serious bodily injury. (See L.A. Police Dept. Manual (2005), §§ 556.25 & 556.40.) LAPD policy expressly precludes the use of deadly force to protect an officer from an assault which is not likely to have serious results, and it may only be used “when all reasonable alternatives have been exhausted or appear impracticable.” (*Id.*, § 556.40.)

In using a baton as deadly force, officers should avoid striking a suspect's head because of the potential for serious injury or death. Baton contact should be directed to the areas of the body that will temporarily incapacitate the combatant and avoid contact to the body parts that could be potentially lethal. Primary striking areas are the arms, hands, wrists, elbows, legs, knees, and shins, and the chest or midsection are secondary areas. Officers must avoid striking the head, neck, throat, spine, kidneys, and groin areas.

Sergeant James Katapodis, one of the use of force experts who testified before the Board of Rights, said that baton or impact weapon strikes should be used only when the suspect is “aggressive or combative.” This means, “fists up, about to attack or appear to attack, making a statement, ‘I’m going to –’ you know, ‘I’m going to take you out or beat you up,’ you know, an aggressive stance or actually combative, striking the officer or about to strike the officer.” But, Katapodis said, LAPD policy requires an officer to “provide a warning prior to the use of an impact [device] . . . where feasible.” A flashlight may be used as an impact device in exigent circumstances, but such use is discouraged, and not even taught. Katapodis testified that he was unaware of any circumstance where a gun was used as an impact device. Use of a gun in such a manner is never taught to LAPD officers.

Katapodis further testified, “[I]f you’re going to strike someone, you shouldn’t intentionally try to hit the head, because it could be potentially lethal [when] you hit

someone in the head with an impact device.” In addition, an officer cannot strike a suspect in the head without there being a threat of serious bodily injury or death. While Katapodis agreed that a “distraction strike” to the head using your hand would be appropriate where a suspect is pinned against a hood of a car and resisting an officer’s attempt to pull his arm from underneath him to handcuff him, such a strike should be to the shoulder area because the head is a secondary target area.

The above evidence amply supports the trial court’s conclusion that McLaughlin violated LAPD policy by twice striking Wilbarn in the head with his pistol, an act of deadly force, which the trial court reasonably found was not warranted under the circumstances. Substantial evidence also supported the trial court’s findings that “[o]nce McLaughlin had pinned Wilbarn against the car’s hood, and had two other officers attempting to pull his arms back to handcuff him, he was no longer in a situation where he or the other two officers were in a life-threatening situation. This is true even though McLaughlin thought Wilbarn was armed and his hands were in his waistband and not under control. As McLaughlin admits, he never saw a gun. At that time, McLaughlin was more accurately in situation of trying to handcuff an uncooperative arrestee where deadly force was not justified. [¶] Katapodis described this situation as aggressive, combative warranting the use of a distraction strike. But a pistol blow to the head is the use of deadly force, and it was not warranted. . . . McLaughlin . . . had no reason to believe that Wilbarn would have been able to arm himself without one of the three officers being able to shoot him first. Thus, he did not reasonably believe that . . . his life or the lives of the other two officers was subject to an *immediate* threat of death or serious bodily injury. . . . [¶] Additionally, LAPD policy expressly precludes the use of deadly force unless all reasonable alternatives have been exhausted or appear impracticable. McLaughlin did not need to use a pistol strike as deadly force to control Wilbarn. Even if he had no alternative but a strike with something other than a fist, he should not have struck Wilbarn in the head.” (Original italics.)

As he did in the trial court, McLaughlin cites *Graham v. Conner* (1989) 490 U.S. 386 (*Graham*) and *Scott v. Henrich* (9th Cir. 1994) 39 F.3d 912 (*Scott*) to support his

argument that he did not have to use less intrusive alternatives to apprehend Wilbarn and that the Board of Rights and the trial court engaged in improper retrospective analysis. McLaughlin argues that the circumstances warranted deadly force, and the Board of Rights “could not properly second guess [his] decision to pistol-whip Wilbarn, instead of using a method deemed less lethal.” We disagree.

In *Graham*, the court held claims of excessive force by a police officer under the Fourth Amendment are decided by a standard of objective reasonableness, which is not determined by hindsight, and must allow for the fact that police officers are often forced to make a split-second judgment about the amount of force that is necessary in a particular situation. (*Graham, supra*, 490 U.S. at pp. 396-397.) In *Scott*, the court held the inquiry of reasonableness under the Fourth Amendment does not require an officer to use the least intrusive means of responding to an exigent situation. Rather, the officer need only act within a range of reasonable conduct. (*Scott, supra*, 39 F.3d at p. 915.)

Graham and *Scott* are not directly applicable here. Those cases address an officer’s *civil* liability for use of excessive force under the Fourth Amendment. That is not our case. Rather, we are presented with the application of a police agency’s own internal policies in its determination to discipline an officer for violating those internal policies. McLaughlin does not offer any argument to explain why these cases are directly applicable in the context of a police agency’s internal disciplinary process or why retrospective analysis is improper when a police agency evaluates the conduct of one of its officers to determine whether the officer must be disciplined for violating those policies. Even though our review of the record reveals the trial court considered the objective reasonableness test, we also agree with the trial court that the LAPD is free to impose more restrictive or different limitations on its officers than the Fourth Amendment requires.²

² McLaughlin also contends the trial court improperly relied upon a matter outside the record in deciding whether he used unauthorized force – the Rodney King beating incident. We reject this contention. There is no support in the record that the trial court relied upon the facts of this incident in analyzing and deciding McLaughlin’s case.

McLaughlin further argues the trial court erred in concluding that once McLaughlin had pinned Wilbarn against the car's hood, and had two other officers attempting to pull his arms back to handcuff him, he was no longer in a situation where he or the other two officers were in a life-threatening situation. He argues the word "pinned" does not accurately describe the situation because the officers did not have Wilbarn under control and there is no evidence the three officers were able to "relax, reflect, and reassess." Again, we must disagree.

The fact the officers were at that time not able to "relax, reflect, and reassess" does not mean the trial court was required to find that deadly force with an impact device was justified. The testimony indicated that not one of the three officers saw Wilbarn with a gun. And, while all three officers feared for their lives, all of them were physically holding Wilbarn and trying to restrain him so he could be handcuffed. We hold that substantial evidence supports the trial court's conclusion that at this point the officers were no longer in a life-threatening situation and that deadly force was not warranted.

We agree with the trial court on another point: Police officers are all too often placed in seemingly untenable positions with persons' safety often in the balance. In drawing that often imperceptible line between protecting officers and public safety, on the one hand, and limiting excessive force on the other, law enforcement agencies necessarily establish certain policies required of each officer. In this case, the Board of Rights and the trial court found McLaughlin violated those policies, and because substantial evidence supports the trial court's finding, we affirm.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.